Supreme Court, U.S.
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No. 87-444

In The

Supreme Court of the United States

October Term, 1987

RICHARD L. SMEGAL, MARVIN A. ROGERS, and RODNEY W. BOMSTAD, on behalf of themselves and all others similarly situated,

Petitioners,

v.

GATEWAY FOODS OF MINNEAPOLIS, INC., and OVER-THE-ROAD, CITY TRANSFER, COLD STORAGE, GROCERY & MARKET DRIVERS, HELPERS & INSIDE EMPLOYEES UNION, LOCAL NO. 544, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, NATIONAL SUPER MARKETS, INC.,

Respondents.

BRIEF OF RESPONDENT NATIONAL SUPER MARKETS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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October, 1987

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QUESTION PRESENTED FOR REVIEW

The question presented in the Petition for Writ of Certiorari to United States Court of Appeals for the Eighth Circuit (the "Petition") is not worthy of review by this Court. The decision of the Court of Appeals for the Eighth Circuit in this case is fully consistent with decisions of this Court and is not of general significance to others. Consequently, further review is unwarranted.

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BRIEF OF RESPONDENT NATIONAL SUPER MARKETS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

The background of this case is set forth in the reported opinions of the Court of Appeals *Smegal, et al. v. Gateway Foods of Minneapolis, et al.*, 763 F.2d 354 (8th Cir. 1985) ("Smegal I") and 819 F.2d 191 (8th Cir. 1987) ("Smegal II") (Pet. App. A2-A12).

In *Smegal I,* the Court of Appeals affirmed the District Court granting summary judgment in favor of National Super Markets, Inc. ("National") and thus, dismissed National from the case. At the same time, the Court remanded the successorship claim against Respondent Gateway Foods of Minneapolis, Inc. ("Gateway") and Respondent Teamsters Local 544 ("the Union").

Upon remand, the plaintiffs, Gateway and the Union entered into a Stipulation of Facts on Successorship Issue (Pet. Appendix E) ("Stipulation"). National did not participate in the negotiation of this Stipulation, was not party to the action at the time this Stipulation was executed and is not a party to the Stipulation.

Subsequently, by agreement of the plaintiffs, Gateway and the Union, the District Court granted Gateway leave to file a third party complaint against National (Add. 1-3). Gateway then filed a third party complaint against National seeking indemnification.

After service of the third party complaint, National filed a motion to dismiss or, alternatively, to strike Gateway's third party complaint. This motion was heard at the same time as the summary judgment motion of Gateway and the Union. The District Court granted the summary judgment motion and ruled that, "Having determined that Gateway is not a successor to National, the Court will not reach National's motion to dismiss or alternatively to strike Gateway's third party complaint." (Pet. App. A-22 n.2.)

Although the plaintiffs appealed the District Court's order granting summary judgment in favor of Gateway and the Union, Gateway did not appeal the District Court's

ruling. In *Smegal II*, the Court of Appeals affirmed the District Court's decision in all respects.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The decision of the Eighth Circuit in *Smegal II* is consistent with decisions of this Court and with decisions of the other circuits. Indeed, this Court as recently as last Term in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. —, 96 L.Ed. 22, 107 S.Ct. — (June 1, 1987) has put to rest any lingering questions with respect to the successorship. This petition does not involve any important, unresolved question of federal law. The Court of Appeals decision here is fully consistent with the *Fall River* decision. It is unnecessary for the Court to revisit the successorship issue so soon after that decision.

CONCLUSION

The Petition for Writ of Certiorari to the Court of Appeals for the Eighth Circuit should be denied.

Dated: October 12, 1987.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Richard L. Smegal, Marvin A. Rogers, and Rodney W. Bomstad, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

Civil File No. 3-81-1105

ORDER GRANTING DEFENDANT GATEWAY FOODS OF MINNEAPOLIS, INC. LEAVE TO FILE THIRD PARTY COMPLAINT

Gateway Foods of Minneapolis, Inc., National Super Markets, Inc., and Over-The-Road, etc., Local No. 544, affiliated with the I.B.T., etc.,

Defendants.

Upon the annexed consent and stipulation of the attorneys for the respective parties and upon the motion of counsel for defendant Gateway Foods of Minneapolis, Inc., it is

ORDERED that defendant Gateway Foods of Minneapolis, Inc.'s motion for leave to file third party complaint is granted; and it is further

ORDERED that defendant Gateway Foods of Minneapolis, Inc. third party complaint be served upon counsel for plaintiffs and defendant union by mail and presented to the clerk of this court for issuance of a summons and for service of process on said National Super Markets,

Inc. in accordance with the Federal Rules of Civil Procedure; and it is further

ORDERED that the style of this action hereafter conform to that specified in the aforesaid third party complaint and that the clerk of this court is hereby ordered to mark his records in this case accordingly.

Dated: April 18, 1986

/s/ Paul E. Magnuson
United States District Judge

STIPULATION

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the foregoing order granting defendant Gateway Foods of Minneapolis, Inc. leave to file third party complaint may be presented for signature to the judge presiding over the hearing of this action or to his magistrate and that any hearing on defendant Gateway Foods of Minneapolis, Inc.'s motion for leave to file third party complaint is hereby waived.

Dated this 7th day of April, 1986.

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